A

Sou Yong v Yuzin bte Abdullah @ Ho Yuzin

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–295 OF 1999

B ABDUL AZIZ MOHAMAD, MOKHTAR SIDIN AND JAMES FOONG JJCA

26 MAY 2006

Contract — Formation — Contract for sale of property — Parties entered agreement to

C *make sale and purchase agreement of land — Parties to transaction, property price, description of property specified — Whether need to identify other terms — Whether an 'open contract'*

Contract — Uncertainty — Terms — Contract for the sale of land — Actual purchaser

D *an individual — Company being named as the purchaser in the draft sale and purchase agreement — Whether uncertainty as to parties*

E The respondent was the registered owner of a piece of land and by a handwritten letter dated 6 March 1997 signed by both parties ('the subject letter'), the respondent agreed to sell the land to the appellant for a consideration of RM220,000. The appellant paid a deposit of 10% as was required by the letter. It was agreed that a formal sale and purchase agreement was to be drawn up by the appellant's solicitors pending a search to be done on the land. By a letter dated 17 April 1997,

F the respondent wrote to the appellant repudiating the sale of the land to the appellant and returned the 10% deposit which she had earlier accepted. The appellant rejected the repudiation and filed an action claiming for a declaration that the letter dated 6 March 1997 was valid and subsisting and an order for specific performance that the defendant do enter into a formal sale and purchase agreement and complete the same

G pursuant to the terms of the letter dated 6 March 1997. When the draft of a formal sale and purchase agreement was prepared by the appellant's solicitors, the purchaser was stated to be Countryside Homestead. For that reason, the learned trial judge said that there is uncertainty as to the actual purchaser and on this ground alone the claim must fail for uncertainty. The only defence to be considered in this appeal was the first defence, as to which the only live question was whether the subject letter

H constituted a 'concluded agreement'. The respondent submitted that the subject letter did not constitute a binding agreement because it did not provide for the completion date, the payment of the balance, the consequences of breach and other terms.

I

Held, allowing the appeal:

(1) There was no uncertainty as to the actual purchaser in the contract. The actual purchaser was the appellant, and it was the appellant that was seeking to enforce the contract by having it specifically performed. The reasons that the

appellant gave for that company's being named as the purchaser in the draft sale and purchase agreement had been set out, the primary reason being that the company was merely a vehicle for the purchase. The argument of uncertainty was merely an excuse to escape from liability under the contract since it had never been the respondent's stand that she did not wish to perform the contract if the land was to be transferred to the company (see para 27).

(2) It was clear from the subject letter that the completion date was a date three months after the date of the agreement, with a one-month extension subject to interest. As to the balance of the purchase price, it must be implied that it was to be paid by the completion date. As to consequences of breach and other terms, only three things were required to be specified for an arrangement for sale to constitute an open contract, namely the names of the parties, a description of the property, and a statement of the price, all of which were specified in the subject letter in this case (see *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, Gopal Sri Ram JCA). In mentioning 'the terms they considered essential' among the terms that the parties had identified in Charles Grenier, Gopal Sri Ram JCA was merely stating what the parties happened to have identified besides the property and the price and could not have intended to say that for an arrangement to constitute an open contract the parties must also have identified other terms. If that were the law, an open contract can never be determined with certainty to have been established, because there will be no end to terms that may be said to have not been identified. The law must be specific as to the terms that must be identified for the formation of an open contract (see para 28).

(3) A power of attorney clause is not required for an arrangement to constitute an open contract and furthermore because the power of attorney clause was not part of the subject letter, which was the contract that the appellant sought to enforce, but was merely a clause about a non-fundamental detail in the sale and purchase agreement that the parties had agreed to enter into for the better implementation of the contract in the subject letter (see para 29).

(4) According to the prayer, the appellant wanted the respondent to specifically perform the contract in the subject letter by entering into a formal sale and purchase agreement and completing it. The obligation to enter into a formal sale and purchase agreement was agreed to between the parties in the subject letter. To order the respondent to enter into a formal sale and purchase agreement would not be ordering her to enter into a contract. It would just be ordering her to specifically perform a contract that she had already entered into (see para 30).

[Bahasa Malaysia summary

Responden adalah pemilik berdaftar sebidang tanah. Perayu menegaskan bahawa melalui sepucuk surat tulisan tangan bertarikh 6 Mac 1997 yang ditandatangani oleh kedua-dua pihak (surat tersebut), responden telah bersetuju untuk menjual tanah tersebut kepada perayu untuk balasan RM220,000. Perayu telah membayar deposit sebanyak 10% seperti yang dikehendaki di dalam surat tersebut. Adalah dipersetujui bahawa suatu perjanjian jual beli rasmi mestilah dibuat oleh peguam perayu sehingga

suatu carian dibuat ke atas tanah. Melalui surat bertarikh 17 April 1997, responden tersebut telah menulis kepada perayu untuk menolak penjualan tanah tersebut kepada perayu dan mengembalikan 10% deposit yang beliau telah terima. Perayu menolak penolakan tersebut dan telah memfailkan tindakan untuk menuntut suatu deklarasi bahawa surat bertarikh 6 Mac 1997 adalah sah dan berterusan dan suatu perintah pelaksanaan spesifik bahawa responden diperintahkan untuk memasuki perjanjian jual beli yang rasmi dan memuaskannya menurut terma-terma surat bertarikh 6 Mac 1997. Apabila draf perjanjian jual beli rasmi disediakan oleh peguamcara perayu, pembeli tersebut dinyatakan sebagai Countryside Homestead. Atas alasan tersebut, hakim perbicaraan yang bijaksana menyatakan terdapat ketidaktentuan pembeli sebenarnya dan atas dasar ini sahaja, tuntutan akan gagal untuk ketidaktentuan. Pembelaan yang hanya patut diambil kira di dalam rayuan ini ialah pembelaan yang pertama, satu-satunya soal hidup ialah sama ada surat tersebut membentuk satu 'perjanjian yang disempurnakan'. Responden berhujah bahawa surat tersebut tidak membentuk satu perjanjian yang mengikat oleh kerana ia tidak membekalkan tarikh penyempurnaan, baki harga yang perlu dibayar, dan hasil dari kemungkiran dan terma-terma lain.

Diputuskan, membenarkan rayuan tersebut:

(1) Tiada terdapat ketidaktentuan akan pembeli yang sebenarnya di dalam kontrak ini. Pembeli sebenarnya ialah perayu, dan perayulah yang memohon untuk melaksanakan kontrak tersebut secara pelaksanaan spesifik. Alasan-alasan yang diberikan oleh perayu untuk syarikat yang dinamakan sebagai pembeli di dalam draf perjanjian jual beli telah diberikan, alasan utama ialah syarikat tersebut hanya digunakan sebagai alat untuk membeli. Penghujahan ketidaktentuan adalah satu alasan untuk responden untuk dilepaskan dari liabiliti di bawah kontrak tersebut oleh kerana ia tidak pernah menjadi pendirian responden bahawa dia tidak ingin menyempurnakan kontrak tersebut jika tanah itu dipindahkan kepada syarikat tersebut (lihat perenggan 27).

(2) Adalah jelas daripada surat tersebut bahawa tarikh penyempurnaan adalah tiga bulan selepas tarikh perjanjian, dengan lanjutan satu bulan tertakluk kepada faedah. Mengenai pembayaran baki harga belian, ia patut tersirat bahawa ia patut dibayar pada tarikh penyempurnaan. Mengenai hasil dari kemungkiran dan terma-terma lain, hanya terdapat tiga perkara yang perlu untuk ditetapkan untuk satu atur cara jualan membentuk 'kontrak terbuka', iaitu nama-nama pihak-pihak, gambaran harta yang diberi, dan satu pernyataan akan harga, yang kesemuanya dinyatakan di dalam surat tersebut di dalam kes ini (lihat *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, Gopal Sri Ram JCA). Dalam menyebut 'terma-terma yang mereka anggap penting' di antara terma-terma yang pihak-pihak mengenal pasti di kes Charles Grenier, Gopal Sri Ram JCA hanya menyatakan apa yang pihak-pihak dapat mengenalpasti selain daripada hartanah dan harga dan ini tidak bermaksud bahawa untuk satu atur cara membentuk kontrak terbuka, pihak-pihak patut juga mengenal pasti terma-terma yang lain. Jika undang-undang adalah sebegini, maka kontrak terbuka tidak akan dapat diselesaikan dengan kepastian, oleh kerana terma-terma yang harus dikenal pasti tidak akan

berakhir. Undang-undang mestilah tentu akan terma-terma yang patut dikenal pasti untuk formasi satu kontrak terbuka (lihat perenggan 28).

(3) Satu klausa surat kuasa wakil tidak diperlukan untuk satu atur cara membentuk satu kontrak terbuka dan selanjutnya juga oleh kerana klausa surat kuasa wakil tidak menjadi sebahagian surat tersebut, iaitu kontrak yang perayu ingin laksanakan, tetapi hanya satu klausa yang tidak menjadi asas di dalam perjanjian jual beli, yang pihak-pihak bersetuju untuk memasuki untuk menjalankan kontrak di dalam surat tersebut dengan lebih berkesan (lihat perenggan 29).

(4) Menurut permohonan perayu, perayu menghendaki responden melaksanakan secara spesifik kontrak di dalam surat tersebut dengan memasuki satu perjanjian jual beli rasmi dan menyempurnakannya. Obligasi memasuki satu perjanjian jual beli rasmi dipersetujui oleh pihak-pihak di dalam surat tersebut. Untuk memerintahkan responden memasuki satu perjanjian jual beli rasmi bukan maksud memerintahkannya memasuki satu kontrak. Ia hanya memerintahkannya secara spesifik melaksanakan kontrak yang dia telahpun masuk (lihat perenggan 30).]

Notes

For cases on contract for sale of property, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3213–3216.

For cases on uncertaninty of terms, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4822–4824.

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (refd)

Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia [2000] 2 MLJ 535 (refd)

Sou Yong v Yuzin bte Abdullah [1999] 5 MLJ 696

Legislation referred to

Contracts Act 1950 ss 11, 12, 19(1)

Specific Relief Act 1950 s 21(2)(a)

Appeal from: Civil Suit No S2–22–362 of 1997 (High Court, Kuala Lumpur)

BS Sidhu (Sharon Sidhu and Andrew KC Ng with him) (Yeo & Yeo) for the appellant.
N Saraswathy Devi (V Alagendra with her) (N Saraswathy Devi) for the respondent.

Abdul Aziz Mohamad JCA (delivering judgment of the court):

[1] On 6 March 1997, the respondent and the appellant signed a hand-written letter addressed 'To Whom It May Concern'. One Lim Chiu Yong also signed, as witness. The letter said:

> In consideration of the sum in ringgit: Twenty-two thousand (RM22,000) only representing the ten percentum of the selling price for the piece of agriculture land, known as Lot 1748

(762) in the Mukim of Perak, Daerah Temerloh, State of Pahang. Acreage: 1 ac 3 r 00 p. The total selling price for the whole piece at ringgit: Two Hundred Twenty Thousand (RM220,000). Balance Amount: Ringgit One Hundred Ninety-Eight Thousand (RM198,000) only.

I namely, YUZIN BTE ABDULLAH K/P 300823–10–5028 residing at No 9, Lorong Tun Ismail, 50480 Kuala. Lumpur do hereby give my IRREVOCABLE CONSENT TO SELL the above mentioned property to MR SOU YONG K/P 3415708.

The duration for the completion of the sale is Three (3) plus 1 month @ 10% interest per annum. The signing of the Sales & Purchase Agreement is to be signed upon the Official Searched [*sic*] at The Land Office.

Dated this 6th Day in the Month of March, 1997.

Sgd.

YUZIN BTE ABDULLAH

(VENDOR)

Sgd.

SOU YONG

(PURCHASER)

Sgd

LIM CHIU YONG

(WITNESS)

K/P 3141647

We shall refer to this letter as 'the subject letter'.

[2] Because the respondent failed to sign the sale and purchase agreement as envisaged in the last sentence of the subject letter, and contending that the subject letter constituted a binding contract, the appellant, by a writ and statement of claim dated 14 August 1997, sought in the High Court a declaration that the subject letter 'is valid and subsisting' and an order of specific performance of the contract, directing that the respondent 'do enter into a formal sale and purchase agreement and complete the same pursuant to the terms of the (subject letter)'. The appellant also sought damages, which were to be assessed, and interest on them. The dismissal of the appellant's action in the High Court resulted in this appeal. The judgment in the High Court is reported as *Sou Yong v Yuzin bte Abdullah* [1999] 5 MLJ 696. Later in this judgment, we shall be referring to certain parts of the High Court judgment and we shall identify those parts by reference to the copy of the original typewritten judgment in the record of appeal, but with the report references in square brackets.

[3] The respondent raised several defences in her amended statement of defence. The first defence, in para 2, amounted to a contention that the subject letter did not constitute a 'concluded agreement' but, if it did, 'it was subject to several conditions precedent before a formal written contract could be exchanged' between the parties.

[4] The second defence, in para 3 to 3.6 of the amended statement of defence, purported to be in reliance on s 19 of the Contracts Act 1950, sub-s (1) of which

renders a contract voidable when the consent of the party concerned is caused by coercion, fraud or misrepresentation. The respondent averred that she was induced to sign the subject letter by three false representations made orally to her by the appellant, which she believed to be true. One representation was that the payment of RM22,000 mentioned in the subject letter was subject to contract and the respondent would be entitled to refund it if the terms of the contract were not agreed upon, and that was said to be untrue because although the terms of the contract could not be agreed upon, the appellant refused to allow the respondent to refund the money. Another representation was that the appellant would have the property valued for its market value which, if more than 'RM22,000' (obviously RM220,000, the price in the subject letter, was intended), the appellant would pay the market value, and that was said to be untrue because the appellant allegedly refused to have the property valued. The final representation was that the appellant wanted the property for his personal use and that was said to be untrue because the appellant requested the respondent to sell to Countryside Homestead Sdn Bhd.

[5] The third defence, in para 3.7 of the amended statement of defence, was in these words: 'The contents of the (subject letter) was never shown to the defendant and was executed by the defendant while she was under the influence of liquor in the dark and did not have her spectacles.'

[6] The fourth defence, in para 3.10 of the amended statement of defence, was that the respondent was not of sound mind when she signed the subject letter. This defence purported to be in reliance on ss 11 and 12 of the Contracts Act 1950.

[7] For the convenient disposal of the matters that have arisen or otherwise need to be disposed of in this appeal, it is expedient to set out the evidence on each side. The witnesses for the appellant were the appellant himself and the said Lim Chiu Yong. Combined, their evidence was as follows. On or about 14 February 1997 the appellant was having drinks at the Batik Bar of the Royal Lake Club in Kuala Lumpur with Lim Chiu Yong and Ho Hon Hing. Lim and Ho, who were not members of the Lake Club, were there at the invitation of the appellant, who was a member. They were the appellant's friends of, respectively, fifteen and twenty years' standing. The respondent, whom the appellant had known for twenty-five years, was also there. As she was alone, the appellant invited her to join his group. The appellant introduced her to Lim and Ho. When Ho mentioned that he worked in Temerloh, the respondent said that she had a land in Temerloh that she wanted to sell and she asked the three men to find a buyer for her. The appellant asked Ho to check on the land and "suggested to the Defendant that the three of us … will make her an offer then". The respondent was very happy and said that she bought the land a long time ago and hoped to get RM250,000 for it.

[8] On the morning of 6 March 1997, around 9am or 10am, Ho came to Lim to borrow RM60,000. He told Lim that the respondent had agreed to sell the land to him for RM220,000 and he was short of RM60,000, which he needed to have quickly because the respondent was going to Temerloh the next day to sign the agreement. Lim was shocked and angry because the deal had been proposed by the appellant. He told off Ho and did not lend the money. He immediately went to the

appellant's office and related what had happened. That was after 11am. Shocked and angry because the three were supposed to buy the land jointly, the appellant immediately, at about 11.30am, telephoned the respondent to talk about it. The appellant told the respondent that since it was he who had proposed the deal and they were such old friends, she should sell the land to him and not to Ho. Because the respondent said that she was going to Temerloh the next day to sign the agreement with Ho, the appellant invited the respondent for lunch that day itself at the Royal Lake Club. There they met at about 12.30pm at the Bunga Raya Chinese Restaurant. Lim was there too.

[9] The restaurant was brightly lit. At their table it was not dark at all. The respondent explained that she had been prepared to sell the land to Ho because Ho had told her that the appellant and Lim were no longer interested in the land. She was happy and willing to sell the land to the appellant. She said that God had been kind in bringing the appellant to her, as she was saved the trouble of going to Temerloh to sign the agreement with Ho. Terms were discussed and agreed. The appellant offered the same price as the respondent had agreed with Ho, RM220,000. The respondent agreed, after at first asking for RM10,000 more. The respondent did not request for any specific terms. She was quite happy to be receiving the 10% deposit. Lim, using paper and carbon paper from the restaurant, wrote out the subject letter at the lunch table itself, at the request of the appellant and the respondent, obtaining the necessary particulars from a copy of the land title and of the quit rent receipt and a photostat copy of the respondent's identity card that she had brought with her. The letter was signed before lunch arrived. A carbon copy was given to the respondent. The respondent (the appellant believed) was having her first glass of red wine when the letter was signed. She did not appear drunk then. Her behaviour was normal. She was jovial and rational all through the lunch. She was wearing her spectacles and did not need help to read the subject letter, which she did before signing it. According to Lim, she took out and put on her spectacles before reading the letter.

[10] The sale was not subject to any condition precedent. The search mentioned in the subject letter was to facilitate the drawing up of the formal agreement by the appellant's solicitors.

[11] After the respondent signed the subject letter, RM22,000 was paid to her, RM2,000 by cash and RM20,000 by a cheque. The cheque was presented for payment on 8 March.

[12] No question of a valuation report arose, either from the respondent or the appellant, because the price of the land had already been agreed at RM220,000, which the respondent had already agreed with Ho as the purchase price.

[13] The appellant did not represent to the respondent that the 10% deposit was refundable or that the sale was subject to contract.

[14] As to the purpose of the purchase, the appellant only remembered saying that 'it was for investment purposes as it was a piece of agricultural land'.

[15] After the search, which was on 12 March 1997, the appellant's solicitors prepared a draft sale and purchase agreement in which the purchaser was stated to be Countryside Homestead Sdn. Bhd., a company in which the appellant and Lim had 50% share each, although when the subject letter was signed the shareholders and directors were Lim and his wife. It is a fact that Lim's wife resigned as director on 31 March 1997 and that the appellant was thereupon, on 1 April 1997, appointed director. That company was named as the purchaser because, the purchase being for investment purposes, the appellant considered it more appropriate to use a private limited company as the vehicle for the purchase and also because, since Lim had been involved in the purchase from the very beginning, he and Lim had agreed, before the meeting with the respondent, to purchase it jointly. A copy of the draft was given to the respondent. It was Lim who gave it to her at the Royal Lake Club towards the end of March 1997. She did not object to Countryside Homestead being the purchaser or to any other term. She told Lim not to worry, her son would look at the draft for her. She only, subsequently, objected to the inclusion of cl 15.1, the power of attorney clause, although she had verbally agreed to it in the discussion on 6 March 1997, after the subject letter was signed and she had received the 10% deposit. The power of attorney was to enable the appellant to apply for the conversion of use of the land, which was agricultural land, for the subdivision of the land and for the approval of the layout and other plans.

[16] So, by letter of the appellant's solicitors dated 10 April 1997, a second draft was sent to the respondent, without the power of attorney clause. The letter mentioned the fact of deletion of the clause and expressly explained that the appellant had appointed Country Homestead as the vehicle for the purchase of the land. But on 17 April 1997 she wrote and said: 'I do not agree to the terms and conditions stated in your Agreement nor do I have knowledge of the purported Power of Attorney'. She sent a cheque for RM22,000 to refund the payment that the appellant had made. At some time, she told the appellant that she wanted to give the land to her son. The appellant did not accept the repudiation, and on 22 April 1997 his solicitors returned the cheque, saying that the appellant would be seeking specific performance. On the appellant's instructions, his new solicitors sent another letter on 2 June 1997, giving the respondent seven days to finalize the terms of the second draft agreement. The respondent replied on 7 July 1997 in the same terms as her letter of 17 April 1997. She sent another cheque to refund the RM22,000. On the appellant's instructions, his solicitors returned the cheque on 11 July 1997.

[17] The appellant said that he was prepared to complete the purchase in his own name.

[18] So much for the evidence on the appellant's side. On the respondent's side, she herself and Ho gave evidence. The respondent's evidence was as follows. Ho made her an offer to buy the land. There was no response from her. But the appellant, who knew of the offer, telephoned her on 6 March 1997, between 6pm and 7pm, and asked her to meet him at the Royal Lake Club for dinner and drinks. It was dinner according to her even though the appellant, after it being put to him in cross-examination that it was dinner and not lunch, had produced evidence that he was at the Rotary Club Damansara from 5.30pm to 9.30pm on 6 March and had

produced order chits from the Royal Lake Club that proved that it was lunch. In cross-examination, she said that she was confused and could not answer the question whether it was dinner or lunch. Before she left for the Club, she had been relaxing at home and drinking Guinness stout, so that when she arrived she was 'a bit high'. At the place where they were seated the lighting was dim. Although she required glasses for reading she did not have them with her then.

[19] The appellant told her that Ho, with whom he was very angry, was trying to cheat him by purchasing the land himself without the appellant's knowledge. In cross-examination, she maintained that it was not true that she had made arrangements to go to Temerloh on 7 March to sell the land to Ho, but she immediately followed that up with an admission that on 6 March she told the appellant that she had made arrangements with her son to go to Temerloh on 7 March. Earlier in cross-examination, she had said that Ho had made her a temporary offer of RM220,000, but he would have a valuation done and make her a proper offer, which he had not done. The appellant told her that he would pay RM22,000 which she could refund if they did not agree on the terms of the sale, that he would have a valuation of the land done, and that the land was for his personal use. She could not remember whether there had been other terms because she had 'had too much to drink'. She denied giving Lim a copy of the land title and a copy of her identity card. She did sign the subject letter but she did not agree to sell the land to the appellant and did not understand the nature of the document she signed. She denied being given a copy of the subject letter. When in cross-examination, she was referred to her signature on the subject letter, she said, 'I don't know anything about this document. It was in the dark. I had so much to drink. I was quite high'. When asked in cross-examination to state when it was that she realized she had signed the subject letter, she said, 'After dinner Raymond (*Lim*)was drafting it. In the meantime, Sou Yong was ready (*sic*) the money. So I signed. Only when the plaintiff sent me letter of demand I became aware'. She did not remember receiving the cheque for RM22,000 from the appellant or how it was banked into her account, but in cross-examination, she said that one of her brothers took the cheque and banked it in. They were among the last to leave the club. She had had several glasses of Guinness stout there. In cross-examination, she said she also had red wine.

[20] After she refused to sell the land to the appellant she went out with Lim a few times 'for karaoke' but she did not remember Lim giving her a copy of the first draft of the sale and purchase agreement.

[21] It will be observed that the respondent did not make it a point to speak of the events on 14 February 1997, which according to the appellant led to the events on 6 March 1997. Even in cross-examination, she seemed to be avoiding that date. When asked if she recalled meeting the appellant on 14 February 1997 at the Royal Lake Club, she replied, 'I can't remember unless you tell me the day and the occasion.' When asked if she had known Lim or Ho before 6 March 1997, she said she had not. When it was put to her that she met Ho on 14 February 1997 she said she did not remember. Yet the events of 14 February could not be banished from her mind. When asked for how long had she known Ho, she replied, 'Only on 6 March 1997 when Sou Yong asked me to join their table.' The invitation to join at table was,

even on the respondent's own evidence, not an event of 6 March. It was, according to the appellant, an event of 14 February. When asked whom she met on 6 March, she replied: 'Sou Yong, Raymond and Ho. The day I met him the following day he invited me.' It was on 14 February that, according to the appellant, he was with both Lim and Ho. It was only indirectly that she acknowledged the date 14 February. That was when it was put to her that on 14 February she told Lim and the appellant that she had a piece of land in Temerloh that she wished to sell, and she had answered that she only told Ho.

[22] So much for the respondent's evidence. Ho's evidence, most of which was in cross-examination, was as follows. On 14 February 1997 the respondent only wanted to know the value of the land. He had said that on his next trip to Temerloh he would look at the land and would let her know. He put the value at RM500,000. He met her towards the end of February 1997 when he offered to buy the land for RM400,000 for his company. She said that she was not keen to sell the land. She wanted to keep it for her children. Towards the end of March 1997 he met the respondent and was told that the appellant was interested in the land but she had not sold it to him. When asked whether he was not interested in the land after that, he replied, 'Since she didn't reply I too just left it.' He denied meeting Lim on the morning of 6 March to borrow RM60,000. He alleged that Lim had confessed to him in the court canteen that he had lied about it to help the appellant who had promised him a share in the land. He denied agreeing to meet the respondent in Temerloh on 7 March to sign the agreement.

[23] The learned trial judge did not make any finding on the second defence, the defence of misrepresentation under s 19 of the Contracts Act 1950. It was not the defence, or one of the defences, by reason of which he dismissed the appellant's claim. In para 12.5 of the respondent's written submission in this appeal, reference is made to the respondent's evidence as to two of the three representations pleaded in her amended statement of defence, namely that relating to the payment of RM22,000 and that relating to the valuation of the property, but no argument is advanced on the defence of misrepresentation. That defence is not being urged in this appeal. It therefore need not be considered.

[24] The learned trial judge rejected the third defence, which he named 'the defence of drunkenness'. This was what he said:

> I totally reject the defence of drunkenness. There is no evidence of drunkenness except for the defendant's own self-serving allegation that she had a bit too much. In any case even if she had a bit too much I do not think that that had any influence on her. She willingly signed the letter dated 6 March 1997 but as I have held, that by itself, does not constitute a binding contract.

In her written submission in this appeal, the respondent does not submit on this defence. So that defence does not arise in this appeal.

[25] The learned trial judge did not at all touch on the defence of insanity and in her written submission in this appeal the respondent does not submit on this defence. In fact there was not an iota of evidence of insanity.

A **[26]** Therefore, the only defence to be considered in this appeal is the first defence, as to which the only live question is whether the subject letter constituted a 'concluded agreement', because there is no evidence to support the alternative averment that 'it was subject to several conditions precedent before a formal written contract could be exchanged' between the parties.

B

[27] The contract that is in question in this case and that the appellant is seeking specific performance of is the subject letter. According to the subject letter, the purchaser was the appellant. As has been related, when the draft of a formal sale and purchase agreement was prepared by the appellant's solicitors the purchaser was
C stated to be Countryside Homestead. For that reason, the learned trial judge said, at p 13 (p 704A–C) of his judgment, 'Clearly there is uncertainty as to the actual purchaser' and 'On this ground alone this claim must fail for uncertainty'. We think there is no uncertainty as to the actual purchaser in the contract. The actual purchaser is the appellant, and it is the appellant that is seeking to enforce the contract by
D having it specifically performed. The reasons that the appellant gave for that company's being named as the purchaser in the draft sale and purchase agreement have been set out (para 15), the primary reason being that the company was merely a vehicle for the purchase. We think that the argument of uncertainty was merely an excuse to escape from liability under the contract since it had never been the respondent's stand that she did not wish to perform the contract if the land was to
E be transferred to the company. After the first draft of the sale and purchase agreement was given to her, her only objection was to the inclusion of the power of attorney cl 15.1. Even after the second draft was sent to her, with cl 15.1 removed, her objection was not specifically to the company's being the purchaser, in spite of being informed by the letter forwarding the draft that the appellant had appointed the
F company as the vehicle for the purchase. She simply did not wish to proceed with the sale. As has been related (para 16), she said in her letter, 'I do not agree to the terms and conditions stated in your agreement nor do I have knowledge of the purported Power of Attorney'. If she had insisted that the purchaser named in the draft sale and purchase agreement be the appellant, the appellant would probably have relented, seeing that his counsel has requested that in the sale and purchase agreement that the
G respondent should be ordered to enter into should the appellant succeed in this appeal the appellant be named as the purchaser. In para 7.6 of her written submission in this appeal, the respondent urges the fact that the subject letter did not mention that the purchase was to be done in the name of a nominee. That fact may be a relevant consideration if the dispute that brought this case to court arose from the
H respondent's refusal to enter into a formal sale and purchase agreement with the company, but it did not. The respondent simply did not wish to proceed with the deal.

[28] In her written submission in this appeal, the respondent submits that the
I subject letter did not constitute a binding agreement because it did not provide for the completion date, the payment of the balance, the consequences of breach and other terms. As to completion date, it is clear from the subject letter that the completion date was a date three months after the date of the agreement, with a one-month extension subject to interest. As to the balance of the purchase price, it must be implied that it was to be paid by the completion date. As to consequences

of breach and other terms, the respondent relies on two cases as authorities to support her contention that they must be provided for. One case is *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535. It must at once be remarked that there is no indication that in that case there was a term as to consequences of breach. But that is besides the point, because it is the absence of 'other terms' that the appellant means to emphasize, which would include terms such as the consequences of breach. This was what Sheikh Daud JCA said at p 538G:

> The parties have been identified, the property, the price and the terms too have been identified with sufficient certainty. Such an agreement is enforceable as if it was embodied in a sale and purchase agreement. Our finding is fortified by the decision in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327.

That statement relied on *Charles Grenier*. Note the words 'the terms'. At p 336A–B of *Charles Grenier* Gopal Sri Ram JCA said:

> They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity.

Note the words 'the terms they considered essential'. A little further down that page, at D, Gopal Sri Ram JCA quoted the definition of 'open contract', that he must have relied on, given by Dr Geoffrey Cheshire in the 10th edition of *The Modern Law of Real Property*:

> If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an *open contract*. When this form of contract is made, the parties are bound by certain obligations implied by the law.

According to that passage, only three things are required to be specified for an arrangement for sale to constitute an open contract, namely the names of the parties, a description of the property, and a statement of the price, all of which are specified in the subject letter in this case. In mentioning 'the terms they considered essential' among the terms that the parties had identified in *Charles Grenier*, Gopal Sri Ram JCA was merely stating what the parties happened to have identified besides the property and the price and could not have intended to say that for an arrangement to constitute an open contract the parties must also have identified other terms. If that were the law, an open contract can never be determined with certainty to have been established, because there will be no end to terms that may be said to have not been identified. The law must be specific as to the terms that must be identified for the formation of an open contract.

[29] At p 14 (p 704E–F) of his judgment the judge said that the fact that cl 15.1, the power of attorney clause, was inserted in the first draft of the sale and purchase agreement but, after the respondent objected to it, was withdrawn meant that there was uncertainty in the terms of the agreement. The relevant evidence has been set out (paras 15 and 16). This was what the judge said:

> But then again if it was all that simple why did the plaintiff then send two different sets of draft agreement for the defendant to approve. Clearly the 1st draft agreement contained amongst other terms, a term that the defendant would create a Power of Attorney in favour

> of the plaintiff to enable the plaintiff to apply for subdivision. In the second draft this term is omitted. It is plain as pikestaff therefore that there was uncertainty even with regard to the terms of the agreement.

If the judge intended to say that for that reason the subject letter did not constitute a binding contract, he was in error, because a power of attorney clause is not required for an arrangement to constitute an open contract and furthermore because the power of attorney clause was not part of the subject letter, which was the contract that the plaintiff sought to enforce, but was merely a clause about a non-fundamental detail in the sale and purchase agreement that the parties had agreed to enter into for the better implementation of the contract in the subject letter.

[30] Apart from dismissing the appellant's claim on the respondent's first ground, that is the ground that the subject letter did not constitute a 'concluded agreement', the learned trial judge also dismissed the claim on the ground that specific performance ought not to be ordered. There seems to be two reasons for this ground. The first reason can be seen in the following passage at pp 13 and 14 (p 704C–F) of the judgment:

> The plaintiff seeks specific performance and pleads for an order that the defendant do enter into a formal sale and purchase agreement and to complete the same pursuant to the terms of the letter dated 6 March 1997. I do not think the plaintiff can ask for such a prayer. The plaintiff cannot ask this court to order parties to enter into a contract. To my mind, this very plea means the plaintiff agrees that there is no contract and it therefore has to seek this court's assistance to make the contract. What the plaintiff ought to have asked for is a declaration that the letter dated 6 March 1997 constitutes a contract and then ask for specific performance of the terms of that letter.

The appellant did pray for specific performance of the contract in the subject letter. There was no need for a declaration that the subject letter constituted a contract. He only needed to show in the trial that it did. According to the prayer, the appellant wanted the respondent to specifically perform the contract in the subject letter by entering into a formal sale and purchase agreement and completing it. The obligation to enter into a formal sale and purchase agreement was agreed to between the parties in the subject letter. To order the respondent to enter into a formal sale and purchase agreement would not be ordering her to enter into a contract. It would just be ordering her to specifically perform a contract that she had already entered into. It may be mentioned that in the *Sandrifarm* case, the appellant likewise sought specific performance on the respondent's part by executing a sale and purchase agreement. See p 538E.

[31] The judge's second reason for saying that specific performance ought not to be ordered relied on para (a) of sub-s (2) of s 21 of the Specific Relief Act 1950. Subsection (2) sets out the 'cases in which the court may properly exercise a discretion not to decree specific performance'. The case in para (a) is —

> where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

At p 17 (p 705H) of his judgment the judge said:

I find that the conduct of the [appellant] and Lim falls squarely into the category envisaged by [paragraph (a)] so as to give the [appellant] an unfair advantage.

From the manner in which the judgment is composed, it is not clear what conduct of the appellant and Lim that the judge had in mind, although there seems to be four instances of their conduct that the judge looked at, but before we deal with each one of those instances we need to emphasize that para (a) of sub-s (2) of s 21 that the judge relied on speaks of circumstances under which a contract is made that give an unfair advantage to the plaintiff over the defendant.

[32] The first instance of conduct could be in what the judge said soon after saying what we quoted just now. He said that 'it would be more reasonable for the plaintiff to have asked for a valuation report before committing the defendant to a sale, if it was a sale'. It concerned the fairness of the sale price of RM220,000. It will be recalled that the evidence of the appellant and Lim was that at the Royal Lake Club on 14 February 1997 the respondent expressed the hope of getting RM250,000 for the land but subsequently agreed to sell the land to Ho for RM220,000 and that was the price at which the appellant offered to buy the land and the respondent accepted the offer. The amount did not originate from the appellant. It was the price at which the respondent had already agreed to sell to Ho. There was no claim by the respondent in her testimony that it might have been worth more. There was Ho's evidence that towards the end of February 1997, that is before the subject letter was signed, Ho had offered to buy the land for RM400,000 but the respondent said that she was not keen to sell, but the learned trial judge found at p 11 (p 703D) of his judgment 'this bit of evidence more of an embellishment, than the truth'. It also, we find, conflicted with the respondent's evidence. Such being the circumstances, we do not see how the failure of the appellant to obtain a valuation report could be said to give an unfair advantage to him over the respondent.

[33] We do not overlook the fact that according to the respondent in cross-examination Ho only made a temporary offer of RM220,000 and would make a proper offer after having a valuation done, but there was no proper offer, by which we presume that the respondent intended to say that she did not offer to sell the land to Ho for RM220,000. A question of credibility arises, which we shall take this occasion to deal with.

[34] At p 12 (p 703H–I) of his judgment, the judge said: 'I have watched the plaintiff, defendant and their respective witnesses. Whilst the defendant seemed confused with details I find her an honest witness.' It is not clear from the context in relation to what conflict of testimony the judge found the respondent to be an honest witness, but he later, at p 18 [706 A-B], in a passage that we have already quoted (para 24), rejected the respondent's evidence about being drunk when she signed the subject letter as her own 'self-serving allegation'. A witness whose evidence as to what to him must be an important fact is rejected as a lie cannot be said to be an honest witness. Without troubling to list out the proof, although some of it is listed out in para 9 of the memorandum of appeal, we can say with confidence that a reading of the evidence on both sides that we have set out will leave a clear impression on the mind that the respondent was not an honest witness. That apart,

as against his rating of the respondent's honesty, the judge did not undertake a general assessment of the appellant's and Lim's honesty and credibility.

[35] Another instance of the conduct of the appellant and Lim that the judge might have had in mind could be what appears at p 12 (p 703 H) of the judgment, where the judge said that there was a concerted effort by the appellant and Lim not to disclose to the respondent that the actual purchaser of the land was Countryside Homestead. We have dealt with the reason why, when the draft sale and purchase agreement was prepared, the company was named as the buyer. There is nothing in the evidence that we have set out to show that there was such a concerted effort on the part of the appellant and Lim. No reason has been suggested why the appellant or Lim should desire that the respondent should not know that the purchase was to be in the company's name. As we said, it was not the respondent's case that she would not have signed the subject letter had she known that the purchase was to be in the company's name. In any case, the appellant's intention to have the purchase in the company's name, and the respondent's ignorance of that intention, can hardly be a circumstance under which the contract in the subject letter was made that gave an unfair advantage to the appellant over the respondent.

[36] At p 17 (p 705 E) of the judgment, the judge said that he disbelieved the evidence of the appellant and Lim that they obtained the necessary particulars for the subject letter from copies of the land title, land rent receipt and the respondent's identity card that she had brought with her. If the judge intended this to be another instance of the conduct of the appellant and Lim, it is clear that, even if that aspect of the case is not true, it cannot be a circumstance under which the contract was executed which gave the appellant an unfair advantage over the respondent. On the contrary, it is not relevant to any issue, seeing that the contract in the subject letter was signed by the respondent and it contained the particulars of the land and the respondent's identity card number. In any case, we cannot see any reason why the appellant and Lim should have lied about where they obtained the particulars of the land and the respondent's identity card number. It has not been suggested that they obtained the particulars from some other source or that there was a reason, relevant to any issue, why they needed to lie about the source of the particulars. Further, the reason the judge disbelieved the evidence was not because of the demeanour of the appellant and Lim but was solely because they did not tender the documents in evidence. The judge mentioned two aspects of this failure. The first aspect was the failure of Lim and the appellant to produce the documents after Lim had stated in cross-examination that he could produce them through the appellant. That was in answer to the question whether he could produce the documents. According to the notes of evidence, however, at p 35, after that Lim was asked if he had the documents with him, and Lim's reply was in the negative. Then it was put to Lim that the respondent did not give him a copy of those documents, to which he replied that that was not true. The cross-examination on the matter ending with the putting, and moreover there being no indication that Lim was asked after that to have the documents produced, and the failure to produce the documents not having, as far as we can see, been raised by the respondent's counsel in submission, the judge ought not to have held the failure against the appellant or Lim. The second aspect was the failure to include the document in the Common Agreed Bundle of Documents at the

case management stage. We can see two good excuses for the non-inclusion of those documents in the Common Agreed Bundle. One excuse is that, the existence of the subject letter being an undeniable fact, the appellant could not have reasonably foreseen that the source of the particulars in the subject letter would come into question. As we have indicated, it is not a question that is relevant to any issue. Second, the respondent's counsel herself did not in submission in the High Court question the non-inclusion of the documents in the Common Agreed Bundle. She could not have done so in view of the respondent's denial that the documents were brought by her and that the particulars were taken from them. The denial meant that to the respondent the question of the documents had no part to play in this case. Such documents cannot be expected to have been included in an agreed bundle of documents.

[37] Also at p 17 (p 705F–G) of the judgment, the judge expressed doubt about Lim's credibility as regards his evidence about Ho's approaching him to borrow RM60,000 to enable Ho to buy the land. To the judge, it defied credibility that Ho, who wanted to steal a march on the appellant and Lim, would have revealed his intention to Lim. If the judge meant this to be another instance of the conduct of the appellant and Lim, it is clear that, even if Lim's story was not true, it was not a circumstance under which the contract was executed which gave the appellant an unfair advantage over the respondent. As a point of credibility *simply*, we are unable to see to what issue it is relevant, except probably to the issue of misrepresentation, which, as we said, the judge did not decide on. In any case, the judge's conclusion was a conclusion of logic, and not one based on an assessment of the demeanour of Lim, and there seems to be no reason in logic why Lim should have lied about the incident, even though Ho said in evidence that Lim had confessed to him that he had lied about it to help the appellant. We do not see how the lie about the incident would have helped the appellant. The appellant's case was based on the subject letter, which letter is an undeniable fact. The story about the loan was only to show how it came about that the subject letter came to be signed by the appellant and the respondent. Even the respondent admitted that the appellant came to know that Ho had made her an offer to buy the land. There was no other way by which it was suggested that the appellant came to know about Ho's attempt to buy the land. Whether or not Ho came to borrow the RM60,000 should not have made any difference to whether the appellant won or lost in his suit.

[38] There was, therefore, no justification for the judge's finding that the conduct of the appellant and Lim fell within para (a) of sub-s (2) of s 21 of the Specific Relief Act 1950 and no basis for his refusal to order specific performance.

[39] We may as well mention another point on which the judge disbelieved Lim. At p 18 (p 706B) of his judgment, he said that he accepted the respondent's contention that she was not given a copy of the subject letter. The judge did so solely on the logic that if Lim had, as he contended, given the respondent a copy, he would have got the respondent to acknowledge receipt on the copy retained by the appellant. The logic is not inevitable. The subject letter having been signed, there was no vital necessity to give a copy of it to the respondent and accordingly there was no necessity for Lim to be so particular as to obtain an acknowledgment of the receipt

of the subject letter, particularly if Lim could not foresee that a litigation would arise from it or that proof of the giving of a copy of it would be vital to the outcome of the litigation.

[40] Finally, we may mention that the respondent's counsel submitted that the draft agreement was oppressive and unfair. That, however, was not a pleaded defence.

[41] To conclude, we allow the appeal with costs here and below and grant the prayers of the appellant. As regards specific performance, the appellant's counsel has asked that the sale and purchase agreement to be entered into be in the form of the second draft of it and that the purchaser be the appellant and not Countryside Homestead. Accordingly, we make a declaration that the agreement in the letter dated 6 March 1997 is valid and subsisting and order that the respondent enter into a formal sale and purchase agreement in the form of the second draft with the appellant pursuant to the agreement in the letter of 6 March 1997, and complete it, that damages suffered by the appellant as a result of the respondent's breach of the agreement in the letter of 6 March 1997 be assessed, and that interest be payable on the damages assessed at the rate of 8%pa from 14 August 1997, the date of the writ, to date of payment. We would order that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Sally Kee